

APPEAL NO. 020616
FILED MAY 3, 2002

This case returns following our remand in Texas Workers' Compensation Commission Appeal No. 012698, decided December 19, 2001. A hearing on remand was held on February 20, 2002. With respect to the single issue before him on remand, the hearing officer determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) did not become final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). In its appeal, the appellant (carrier) asserts error in that determination. The appeals file does not contain a response to the carrier's appeal from the respondent (claimant).

DECISION

Affirmed on other grounds.

The original version of Rule 130.5(e), effective January 25, 1991, provided:

The first [IR] assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned.

The amended version of Rule 130.5(e), effective March 13, 2000, provided:

The first certification of MMI and [IR] assigned to an employee is final if the certification of MMI and/or the [IR] is not disputed within 90 days after written notification of the MMI and IR is sent by the Commission [Texas Workers' Compensation Commission] to the parties, as evidenced by the date of the letter, unless based on compelling medical evidence the certification is invalid because of:

- (1) a significant error on the part of the certifying doctor in applying the appropriate AMA Guides [Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association] and/or calculating the [IR];
- (2) a clear mis-diagnosis or a previously undiagnosed medical condition;
or
- (3) prior improper or inadequate treatment of the injury which would render the certification of MMI or [IR] invalid.

The amended Rule 130.5(e) was repealed effective January 2, 2002.

In Fulton v. Associated Indem. Corp., 46 S.W.3d 364 (Tex. App.-Austin 2001, pet.

denied), the court determined that the original version of Rule 130.5(e), the 90-day rule, which restricted the time period for disputing an IR, implicitly limited a claimant's time period for revisiting the assessment of MMI, because when the IR became final, so did the determination of MMI. With respect to the original version of Rule 130.5(e), the court held that: (1) because Rule 130.5(e) severely restricts the statutory time period for assessing a final MMI, the Commission exceeded its authority in enacting the rule; (2) the rule is arbitrary and invalid because it impermissibly shortens the statutory time period allotted to an injured worker to achieve MMI; (3) Section 401.011(30) establishes a 104-week deadline for a worker to achieve MMI, and the Commission may not, by rule, shorten this statutory period because to do so would impose restrictions in excess of those imposed by the 1989 Act; (4) Rule 130.5(e) is invalid to the extent that it prevents a reassessment of MMI because the IR or MMI was not disputed within 90 days; and (5) Rule 130.5(e) imposed on Fulton a restriction in excess of that found in the plain language of the 1989 Act and that Fulton's MMI certification, and, therefore, his IR, did not become final.

The amended Rule 130.5(e) is applicable to the case under consideration. In Texas Workers' Compensation Commission Appeal No. 020014-s, decided February 26, 2002, we held that the reasons stated in the Fulton decision which held the original Rule 130.5(e) invalid also applied to the amended Rule 130.5(e). Accordingly, we affirm the hearing officer's decision that the first certification of MMI/IR did not become final under Rule 130.5(e), albeit on other grounds.

The hearing officer's decision and order are affirmed on other grounds.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750
COMMODORE 1
AUSTIN, TEXAS 78701.**

Elaine M. Chaney
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge